IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

Nos. 81-82

THE UNITED STATES OF AMERICA,
Appellant,

vs.

THE WAYNE PUMP COMPANY, ET AL.,
Appellees.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

THE WAYNE PUMP COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF ON BEHALF OF THE WAYNE PUMP COMPANY, B. F. GEYER, TOKHEIM OIL TANK AND PUMP COMPANY, VEEDER-ROOT, INCORPORATED, G. H. ANTHONY, J. H. CHAPLIN, GASOLINE PUMP MANUFACTURERS ASSOCIATION AND G. DENNY MOORE, APPELLEES.

THE LAWYERS' PRINTING COMPANY, 315 WEST ADAMS STREET, CHICAGO

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OPINION BELOW.

The opinion of the District Court (R. 27-43)[1] is reported in 44 Fed. Sup. 949.

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[1] All record references herein, except as otherwise stated, are to the record in No. 81.

JURISDICTION.

The jurisdiction of this Court has been invoked by the Government under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended to March 26, 1942 (18 U. S. C. § 682), providing, in so far as here material, as follows:

> "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to-wit:
>
> "From a decision or judgment • • • sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is *based upon the* • • • *construction of the statute* upon which the indictment is founded. • • •"[2]

The district court sustained appellee's demurrers to the indictments on February 24, 1942 (No. 81, R. 43; No. 82, R. 45). The appeals were taken on March 26, 1942 (No. 81, R. 45; No. 82, R. 47). On April 10, 1942, appellees filed a statement opposing the jurisdiction of this Court. This Court, on May 25, 1942, postponed further consideration of the question of its jurisdiction until the present hearing (No. 81, R. 48, No. 82, R. 50).

[2] Throughout this brief, emphasis is ours unless otherwise noted.

THE QUESTION PRESENTED.

The sole question presented is whether this Court has jurisdiction of these appeals under the Criminal Appeals Act, as in effect at the date of appeal (March 26, 1942).

There is not, as suggested by the Government (Br., p. 2), any question as to whether or not the indictments, to which demurrers were sustained below, state violations of the Sherman Act, upon which they are founded. The appellees have never raised that question. They have consistently contended only that the indictments were so vague and indefinite, particularly in the lack of description of the alleged consensual arrangement constituting the core of each offense charged, that appellees have received no fair notice of the accusations against them. As stated by the court below, in summarizing the demurrers filed by appellees (R. 33):

> "The demurrers challenge the sufficiency of the indictments on the ground that they fail to describe the alleged conspiracies and combinations with which defendants are charged so as to inform them of the nature and cause of the accusations against them and enable them to properly prepare their defenses.
>
> "The cases are before me now for disposition on *these* demurrers."

The issue of pleading *actually* presented by such demurrers and decided by the court below is, under well settled principles, not before this court for adjudication.

The substantive question *not* presented by such demurrers and never litigated below, which the Government now seeks to inject into this case, is likewise not before this Court for adjudication. Appellees were then and are now unable to litigate that question because of their lack of knowledge of the charge made against them.

STATEMENT OF THE CASE.

THE INDICTMENTS.

A. Preliminary.

The summary in the Government's brief (pp. 4-12) of the indictments is inaccurate and misleading, in that it (1) states the Government's interpretation of what, in its view, the Grand Jury intended to charge therein, rather than the averments actually made therein, and (2) departs from the construction placed upon the indictments by the district court, which is, of course, controlling and not open to question in this Court. (*U. S.* v. *Hastings*, 296 U. S. 188, 192; *U. S.* v. *Borden Co.*, 308 U. S. 188, 193.) Accordingly, we shall endeavor to set forth below, for the information of this Court, a statement of the material allegations actually made in the indictments, as construed by the district court.

B. The General Charges and the Parties.

In the indictment in No. 81 (R. 4-19), hereinafter sometimes called the "price-fixing indictment," appellees are charged with engaging in a conspiracy to fix, maintain and control arbitrary, artificial and non-competitive prices for the sale of computer pumps, in violation of Section 1 of the Sherman Act.

In the indictment in No. 82 (R. 3-21), hereinafter sometimes called the "monopoly indictment," the appellees (except the Gasoline Pump Manufacturers Association and G. Denny Moore, its Secretary, not parties to such indictment) are charged with engaging in a conspiracy to monopolize the manufacture and sale of computer pumps (Count I) and a like conspiracy with respect to computing

mechanisms (Count II), in violation of Section 2 of the Sherman Act:

The appellees, The Wayne Pump Company ("Wayne"), Gilbert and Barker Manufacturing Company ("G & B"), and Tokheim Oil Tank and Pump Company ("Tokheim"), are engaged in the manufacture of computer pumps (R. 28). The appellee Veeder-Root, Incorporated ("Veeder") is engaged in the manufacture of computing mechanisms (R. 28). The appellee Gasoline Pump Manufacturers Association (the "Association") is a trade association whose membership consists "for the most part of gasoline pump manufacturers" (R. 28). The individual appellees are officers of the above named corporate appellees and an employee of the Association (R. 28).

C. The Background of the Alleged Conspiracies.

The articles of commerce alleged to be the subjects of the conspiracies are "computer pumps" and "computing mechanisms." Both are "covered by patents issued by the United States" (R. 33).

The computer pump is a gasoline pump embodying a computing mechanism (R. 28). The development of gasoline pumps progressed with the automobile industry, but prior to 1932 no pump had been developed which would automatically calculate and register both the quantities and prices of the gasoline dispensed (R. 33). On November 22, 1932, a patent was issued to Jauch, an employee of Wayne, covering the computer pump, which was subsequently assigned to Wayne (R. 33). This is the only patent identified in the indictments (R. 41). The Jauch patent revolutionized the gasoline pump business and computer pumps soon superseded all other types of pumps, so that by 1939 they represented over 90% in value of all gasoline pumps manufactured and sold in the United States

(R. 33-4). The patented pump was greatly favored by the public because the customer was able to see at a glance both the price and quantity of the gasoline he had purchased (R. 34). The public demand for these pumps became so great that for several years it has been all but impossible for a gasoline pump manufacturer to continue in business unless he manufactures computer pumps (R. 34). The Jauch patent dominates the computer pump field (R. 42).

The Jauch patent is a combination patent covering any combination or unit which embodies "(1) A source of liquid supply. (2) A pump, the suction side of which is connected to said source of liquid supply (3) A meter. (4) A registering means operated by said meter for registering the liquid dispensed and the cost thereof. (5) Means for changing the relation between the cost operating portion whereby the unit cost per unit amount dispensed may be varied" (R. 39)[3].

A "computing mechanism" is thus an indispensable element of the computer pump (R. 39). The term "computing mechanism", as used in the indictments, however, is employed in two senses (R. 28). It may refer to all those parts of a computer pump which simultaneously calculate and register quantities and prices of gasoline dispensed by the pump (that is to say, elements (4) and (5) of the Jauch combination); or it may refer only to that part of a "computing mechanism", as *last* defined, which is used to vary the operation of the price register therein contained (corresponding to element (5) of the Jauch combination) (R. 28). Neither indictment specifies in any of the repeated instances of use of the term (in-

[3] The five elements in the combination were found by the district court on the basis of the decision in the infringement case of *Wayne Co.* v. *Anchor Oil Co.*, 20 Fed. Supp. 745, discussed by common consent in the briefs and arguments of counsel below (and in the brief of the Government in this Court—pp. 29, 55) as though it were a part of the indictments.

cluding its use in describing the subject matter of Count II of the monopoly indictment) which of the two defined meanings is to be assigned thereto.

In any event, for the development of a commercially feasible computing mechanism, Wayne turned to Veeder (R. 9, 30), and the latter developed and has since manufactured for Wayne and its licensees a commercially feasible computing mechanism (R. 9, 30).

In addition to the dominant Jauch patent covering, *inter alia*, the use of any computing mechanism as a part of the patented combination, Wayne also owns or controls patents relating to computing mechanisms themselves (R. 29, 39). The character and scope of these latter patents are not stated (R. 41).

Following the grant of the Jauch patent and the commercial development of the computer pump manufactured thereunder, Wayne granted licenses to G & B and to Tokheim to make, use and sell computer pumps (R. 34). Although the indictments nowhere so state in terms, it is obvious from the allegations thereof as a whole that such licenses, as initially granted, were residual licenses—that is, licenses granting G & B and Tokheim exclusive rights (except for those reserved by Wayne) to make, use and vend. At a later period, when the computer pump became a success and the public demand for it became great, Wayne, with the consent of G & B and Tokheim, granted licenses to eight other pump manufacturers (R. 34). All such licenses contained restrictions as to the prices at which the pumps could be sold (R. 37.)

Wayne, G & B and Tokheim are the three leading manufacturers of gasoline pumps in the United States and during 1939 sold 56% in value of all computer pumps sold therein (R. 31). As might be expected in view of the premises, Wayne and all its licensees during the same year manufactured and sold 100% of the computer pumps sold therein (R. 31).

Veeder has continued to manufacture for Wayne and its licensees the computing mechanisms which are incorporated in and constitute an indispensable element of the Jauch computer pump (R. 30, 31). In prior years the Neptune Company ("Neptune") manufactured computing mechanisms for use in the manufacture of computer pumps by unlicensed manufacturers. Wayne filed an infringement suit against a user of one of these pumps, which was defended by Neptune. The United States District Court which tried the case found the Jauch patent valid, and infringed by both Neptune and the pump manufacturer, and enjoined Neptune from further manufacture of computing mechanisms for use in computer pumps (R. 39).

D. The Accusatory Portions of the Indictments.

After alleging the background, the indictments, in each instance, set forth the accusation made against the appellees, under the heading of "The Combination and Conspiracy". These accusations are found in paragraphs 26 and 27 of the price fixing indictment (No. 81, R. 10-13) and paragraphs 26 and 27, and 32 and 33, of the monopoly indictment (No. 82, R. 9-11, 15-17).

1. *The Price Fixing Indictment.*

In paragraph 26 of the price fixing indictment it is stated in conclusory fashion that appellees

> "• • • beginning in or about the year 1932, • • • and continuously thereafter up to • • • the date • • • of this indictment, knowingly have entered into and engaged in a combination and conspiracy to fix, maintain, and control arbitrary, artificial and non-competitive prices for the sale of computer pumps • • •, in violation of Section 1 of • • • the Sherman Act; which combination and conspiracy is now described in further detail, that is to say": (R. 10).

The court below found (a) that, aside from the foregoing, "there is *no allegation* that there was *any understanding or agreement* among the defendants at all * * *" (R. 37),[5] and (b) that "*How* they [the defendants] took joint action or entered into joint agreements" or "*how* they collaborated" "is nowhere set out in the indictments" (R. 38, 43).

As further pointed out by the court, "thirty *separate acts* or means are then enumerated" in the succeeding paragraph 27, "which are alleged to be 'a part of said combination and conspiracy'" (R. 32).

The only connection alleged between said "acts" themselves, or between said acts and the preceding allegation of "conspiracy" is that they are "parts" of said conspiracy. It is *not* alleged, either "specifically" or otherwise,—although the Government frequently so indicates in its brief,—that said acts were agreed upon by the appellees, or any of them. Nor, accordingly, is the nature or manner of formation of any agreement with respect thereto set forth. The process by which those "separate" acts or things became a part of the conspiracy or related to each other is nowhere disclosed. Moreover, as shown by the discussion hereinafter contained, those "separate" acts or things are themselves so inadequately alleged that the conduct intended to be described is obscure and at times incomprehensible.

A statement of the major "acts" stressed by the Government below and in its brief in this Court, and dealt with in the opinion of the court below, discloses the structure of the indictment, the difficulties found therewith by the court below, and the unwarranted interpretation assigned thereto by the Government herein.

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[5] Except "ordinary patent license agreements" between Wayne and *certain* of the other appellees respectively (see p. 7, *supra*), of which the indictments did not intend to complain as such (R. 37), as conceded by the Government herein (pp. 32-33, *supra*; Gov. Br. pp. 45-49).

Thus paragraph 27 alleges that "it is and has been a part of said combination and conspiracy"

"that the defendants, Wayne, G. & B. and Tokheim use the Jauch patent owned by Wayne for the purpose of fixing prices among themselves on their sales of computer pumps";

"that the defendant Wayne license the defendants G. & B. and Tokheim under the Jauch patent to make, use and sell computer pumps";

"that the defendants, Wayne, G. & B. and Tokheim, devise a formula for determining minimum prices for the sale of computer pumps; that the defendant Wayne, on the basis of aforesaid formula, determine prices for the sale of computer pumps * * *; that the defendant Wayne from time to time issue announcements and regulations stating and interpreting the aforesaid prices * * *; [and] that the defendants, Wayne, G. & B. and Tokheim, in selling computer pumps, adhere to the prices * * * contained in the aforesaid announcements and regulations * * *." (R. 11-12.)

The Government in its brief characterizes these allegations as follows:

"The appellees Wayne, G. & B., Tokheim and *Veeder agreed* to give Wayne's Jauch patent a dominating position in their operations. (Br., pp. 7-8.) * * *

"The Jauch patent was * * * *the facade* of the combination." (Br., p. 39.)

* * * * *

"In *addition* to the *general* charge of conspiracy * * * the indictment charges *specifically* that it was *agreed* that Wayne, G. & B., and Tokheim would devise a formula for determining prices for the sale of computer pumps, on the basis of which Wayne would determine and announce the prices * * * *fixed by agreement*. Wayne, as well as G. & B. and Tokheim, *agreed* to adhere to the prices * * * thus announced." (Br., p. 9.)

* * * * *

"The indictment charges *mutual agreement* among

all the dominating manufacturers for the purpose and with the effect of fixing prices and eliminating competition * * *." (Br., p. 45.)

The contrast between the actual averments, as quoted above, and the Government's characterization thereof, points up the very difficulty found with the indictments by appellees and the district court. The Government in its brief, by characterization and the addition of vital words absent from the indictment, attempts to supply what the draftsman of the indictment either neglected or was unwilling to supply, namely, the explanation of *how* the separate acts alleged in paragraph 27 fitted into the conspiracy generally averred in paragraph 26 and fitted with each other. The Government, by subtle paraphrase, also seeks to remove obscurities in the description of the acts themselves, which the district court found prevented intelligent understanding of the acts attempted to be charged (R. 37).

Similarly, it is alleged in paragraph 27 that "it is and has been a part of said combination and conspiracy"

"that the said defendants [Wayne, G. & B. and Tokheim] determine jobbers' resale prices for computer pumps, refuse to sell computer pumps to any jobber failing or refusing to adhere to such resale prices, and eliminate discounts to all jobbers in the event of a general failure by jobbers to adhere to the said resale prices" (R. 12).

Of these allegations the Government says in its brief:

"They charge an *agreement* among the appellee manufacturers upon resale prices and *a further agreement* to boycott jobbers who do not adhere to those prices. They raise the issue whether *the joint action* of manufacturers in fixing resale prices, the *joint refusal* of manufacturers to deal with price-cutting jobbers, and the *joint elimination* by manufacturers of jobbers' discounts is an unlawful restraint of trade under the Sherman Act, when it is part of a *horizontal agreement* among the manufacturers to eliminate all price competition * * *" (Br., p. 34; see also Br., p. 10).

The Government thus again attempts to supply, by simple assertion, the vitally important missing links of "horizontal agreement" and "joint action" not appearing in the indictment and which the district court stated it was unable to find by construction (R. 37-8, 43).

Likewise, it is alleged in paragraph 27 that "it is and has been a part of said combination and conspiracy"

> "that the defendants Veeder, G. & B. and Tokheim acknowledge the validity of the Jauch patent;"
> "that the defendant Wayne acquire, by purchase or otherwise, ownership or control of all patents on computing mechanisms and computer pumps capable of competing with computing mechanisms manufactured by Veeder or with computer pumps manufactured by Wayne, G. & B. and Tokheim;" and
> "that the defendant Wayne determine the use of all patents on computing mechanisms and computer pumps and improvements thereon owned or controlled by either of the defendants G. & B. and Tokheim" (R. 11).

Of these allegations, described as one of the "principal groups of allegations in the indictments," the Government in its brief says:

> "the appellees *agreed* that G. & B. and Tokheim would acknowledge the validity of * * * Wayne's Jauch patent and surrender control of their patents to Wayne." (Br., p. 28.)
>
> * * * * *
>
> "the indictments charge * * * *agreements* among former and potential competitors binding them * * * to pool and suppress competing patents * * *." (Br., pp. 23-24.)

It will be readily observed, however, that the actual averments say no such thing. They do not indicate that all the appellees were in any way concerned with the acts referred to, and they charge no agreement among them whatsoever, much less indicate whether one or more agreements were intended to be charged. On the contrary, they pose and leave unanswered those very questions. More-

over, although referring vaguely to "competing patents," they fail utterly to give any clue as to the identity thereof or of the (non-competing?) patents "determination of the use" of which is obscurely noted (R. 41, 38).[6]

2. *The Monopoly Indictment.*

The structure and allegations of the accusatory portions of both counts of the monopoly indictment (No. 82, R. 9-11, 15-17) are exactly the same as those of the price-fixing indictment, except for the generic charge of conspiracy and that all references to prices and to the Association contained in the price-fixing indictment are omitted.

After reciting generally that the appellees have engaged in a "conspiracy to monopolize the manufacture and sale of computer pumps" or computing mechanisms, as the case may be (No. 82, R. 9, 15-16), and explaining that the conspiracy is "now described in further detail, that is to say," such counts respectively enumerate 20 and 19 "separate acts or means," prefixed by the allegation that each "is and has been a part of said combination and conspiracy."

The first such act or means alleged in the first count of the monopoly indictment is

> "that the defendants Wayne, G. & B. and Tokheim use the Jauch patent owned by Wayne for the purpose of restricting the manufacture and sale of computer pumps *to themselves*" (No. 82, R. 10);

Subsequently, it is alleged that it is "a part" of said conspiracy

> "that the defendant Wayne with the consent of the

[6] The only disclosure in the indictments, as construed by the court, of the general patent situation in this field, is that the Patent Office has issued, in the aggregate, "numerous patents" on the "*subjects*" of computer pumps, computing mechanisms, and *improvements* on computer pumps and computing mechanisms, *including* the Jauch patent (R. 30), which "revolutionized" the industry, "dominates" the field, and is alone identified (R. 33, 41-42).

defendants G & B and Tokheim approach gasoline pump manufacturers * * * and * * * induce each of such manufacturers to accept a license under the Jauch patent * * *." (No. 82, R. 11.)[7]

Of these allegations, the Government in its brief states, *inter alia*,

"The indictment then describes a conspiracy *to regulate* the entire industry from manufacturer to consumer, using *as a device* to accomplish that purpose the Jauch patent" (Br., p. 7).

* * * * * *

"The indictments charge conspiracies * * * to monopolize commerce in computer pumps * * * by combination *under agreements* among former and potential competitors binding them * * * to cease competition and accept licenses under the Jauch patent * * *" (Br., pp. 23-4).

The above quotations not only dramatize the confusion and vagueness of the indictments, but again emphasize the fundamental pleading defect therein, viz., the absence of meaningful allegations of consensual arrangement, and the Government's belated endeavor to remedy *ex parte* in its brief both such confusion and omission by gratuitous interpolations into the language actually employed by the draftsman. Thus, the Government now advises that the Jauch patent was used as a mere "device" or "facade" (Br., p. 39) to accomplish a nefarious purpose, although the draftsman studiously avoided any such charge; we are also now informed that the nefarious purpose was regulation of "the entire industry," whereas the indictment alternatively refers to restriction of manufacture of computer pumps to Wayne, G & B, and Tokheim alone, and, paradoxically enough, to their campaign to induce other manufacturers to make such pumps; and finally we are informed that all this activity took place pursuant to

[7] Each of these allegations refers to a period of time beginning in 1932 and continuing to the date of the indictment (No. 82, R. 4).

agreements among the appellees to which the draftsman nowhere adverted.

Reference to one further set of allegations, and to the Government's present characterization thereof, will be illuminating. In both counts of the monopoly indictment (as well as in the price-fixing indictment) it is alleged that it is a "part" of the conspiracy complained of

> "that the defendants Wayne, G & B, and Tokheim purchase computing mechanisms only from the defendant Veeder;" and
>
> "that Veeder sell computing mechanisms for use in the manufacture of computer pumps only to Wayne, G & B, and Tokheim and other purchasers approved by Wayne, G & B, and Tokheim;" (No. 82, R. 10, 16).

The Government now characterizes these allegations as follows (Br., p. 53):

> "Wayne, G & B, and Tokheim *agreed* to purchase computing mechanisms only from Veeder and Veeder *agreed* to sell only to them and to other manufacturers approved by them (No. 82, R. 10)."

It will clearly be seen that the allegations, as made in the indictment, however, did not disclose (a) whether any agreement, as distinguished from a course of conduct was described, (b) if there were any agreement or agreements, who were the parties thereto, or (c) if there were any agreement or agreements, what was the nature thereof. The Government in a single stroke now belatedly seeks to eliminate all these ambiguities and difficulties created by the draftsman, and to advise the four appellees in question that a single mutual agreement covering the situation described was, in its view, intended to be charged.

THE DEMURRERS.

Appellees Wayne, Tokheim and Veeder, and their officers, demurred to the indictments (No. 81, R. 19-22, 23-25; No. 82, R. 21-24, 27-28) on the general ground that each failed "to describe and particularize the offense attempted to be charged therein with sufficient definiteness * * * to inform them of the nature and cause of the accusation," "in violation of the * * * Fifth and Sixth Amendments to the Constitution." This general ground of demurrer was reinforced and explained by the three succeeding paragraphs which pointed out the indefiniteness complained of as follows:

> "2. The averments of said indictment purporting to charge a combination and conspiracy in restraint of trade are mere conclusions.
>
> "3. Said indictment fails to make averments sufficient to identify and describe the supposed combination and conspiracy, in that it does not allege with particularity any of the following:
>
> (a) The factual basis upon which the United States relies for its charge that a combination and conspiracy exists or has existed;
>
> (b) The manner of formation of the supposed combination and conspiracy;
>
> (c) The terms of the supposed combination and conspiracy; or
>
> (d) The manner in and by which it is claimed that said defendants became parties to the supposed combination or conspiracy.
>
> "4. The allegations in said indictment with respect to the supposed combination and conspiracy in restraint of trade, and to the intended means for the accomplishment thereof, are so vague, indefinite, uncertain, and conclusory in character as to fail to apprise this defendant of the manner in which the prosecution claims that it has violated the law pertaining to combination or conspiracy in restraint of trade among the several states."

The demurrer of the appellee Association, and its employee (No. 81, R. 25-26), though varying slightly in form, was substantially the same.

From the extracts quoted above, it is apparent that each demurrer complained of the vagueness and indefiniteness of the indictments in the two respects to which we have adverted in our previous summary of the material allegations thereof, namely, that:

(1) The indictments failed adequately to disclose the nature or manner of formation of the consensual arrangement suggested in conclusory fashion by the allegation of conspiracy made in each indictment and underlying every charge therein, or the manner in which the appellees assertedly became parties thereto, or the relation of the "separate" parts thereto or to each other. In short, the indictments were lacking in any meaningful averments of agreement.

(2) The indictments failed adequately to describe the terms of the defectively alleged consensual arrangement or agreement, viz., the things which appellees allegedly agreed to do.

That the court below fully understood that the demurrers challenged the indictments only for vagueness and indefiniteness on the scores set forth above, appears not only from the extract from its opinion quoted *supra*, p. 3, but also from its opinion as a whole. Government counsel in the court below likewise fully understood, and stated, that such vagueness and indefiniteness was the single issue presented to the court for decision.[8]

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[8] In the oral argument on the demurrers, counsel for the United States said:

> "These demurrers raise but one issue. They claim that these indictments do not inform the defendants of the nature and cause of the accusation brought against them; in other words, that their rights under the Fifth and Sixth Amendments have been violated."

THE DECISION BELOW.

The decision of the court below was directly responsive to the demurrers of appellees. It held (R. 27-43) the indictments bad for vagueness and indefiniteness both (1) for failure "adequately [to] describe the nature of the alleged unlawful conspiracy [,] agreements or arrangements which defendants are accused of having made," to "show how the defendants became parties thereto," and to show "how they collaborated in doing the unlawful things" (R. 43), and (2) for failure adequately to set out the material means whereby the alleged conspiracies were to be accomplished.

Each such ground was entirely adequate to support the decision, since a conspiracy indictment bad in either such respect is fatally defective.

The Government in its brief substantially ignores the first, and primary, ground of the decision, by assuming just the reverse of what the court decided. (See extracts quoted *supra*.) Although all its arguments are really, therefore, directed only to the second ground of decision, it, in terms, broadly contends (a) that the court below necessarily construed the Sherman Act in holding the demurrers vague and indefinite, and (b) that the pleading issue presented by the demurrers was frivolous.

Again:

"But the defendants have chosen their issue, and they have boiled it down to a single question of whether the defendants can prepare their defense on the basis of the facts alleged in these indictments." (See Statement Opposing Jurisdiction (p. 4).)

ARGUMENT.

I.

The Demurrers in Challenging the Vagueness and Indefiniteness of the Allegations in the Indictments Describing (A) the Alleged Conspiracies and (B) the Alleged Means for the Accomplishment Thereof, Presented Substantial Questions of Criminal Pleading for Disposition by the Court Below.

On the basis of an asserted analogy to cases arising on writs of error or appeals from judgments of state courts (cf. 28 U. S. C. § 344), the Government contends, *inter alia*, that this Court has jurisdiction to determine whether the indictments charged violations of the Sherman Act for the reason that the challenge thereto for vagueness and indefiniteness made in appellees' demurrers was "utterly lacking in merit" (Br., pp. 37-38).

This argument is, of course, predicated on the assumption that the court below grounded its decision on a construction of the Sherman Act, as well as upon the pleading issue which alone was presented by the demurrers. This we deny.

Moreover, we do not accept as applicable to appeals under the Criminal Appeals Act, the analogy sought to be drawn from the cases relied upon by the Government (Br., p. 37).[1] This Court has repeatedly stated that it will not inquire into pleading questions on Criminal Appeals

[1] So far as such cases decide the allegedly analogous proposition relied on by the Government at all, they merely indicate that a state court may not, in a case in which a litigant has presented a federal question, deprive him of hearing in this Court on that question by the subterfuge of purported adverse decision on an obviously frivolous ground of state law.

or search the record to ascertain whether the decision below might have been based on statutory construction, even where both types of question were raised (*U. S.* v. *Carter*, 231 U. S. 492, 493, 494; *U. S.* v. *Moist*, 231 U. S. 701, 703; *U. S.* v. *Halsey, Stuart & Co.*, 296 U. S. 451, 452).

Notwithstanding our view that the issue of criminal pleading decided by the court below is not before this Court in any sense, the point of its substantiality having been raised, we shall sketch briefly the legal theory of the demurrers, confident that such outline will demonstrate that the issues thus presented were real and substantial and cover the entire case.

A. The Challenge to the Allegations Describing the Consensual Arrangement, Upon Which the Validity of the Indictments as Pleadings Depends.

It is elementary that the gist of the crime of conspiracy consists in agreement in fact among the alleged parties thereto.[2] Such an agreement (consensual arrangement) may, of course, be created in a variety of ways. It may be formal or informal, written or oral; it may consist in an understanding, tacit or express; it may have been formed by piecemeal adherence to a preconceived plan; or by a chain of inter-related agreements made from time to time by various parties in effectuation of a mutual undertaking.[3] But before the legal conclusion of conspiracy may be justified, such a meeting of the minds, constituting such an agreement in fact, must be alleged and proved.[4]

It is likewise elementary that, to constitute a proper

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[2] *U. S.* v. *Falcone*, 311 U. S. 205, 210.
U. S. v. *Piowaty, et al.*, 251 Fed. 375, 377.
U. S. v. *Griffith Amusement Co., et al.*, 1 F. R. D. 229.

[3] *U. S.* v. *Masonite Corp.*, 316 U. S. 265.
Interstate Circuit v. *United States*, 306 U. S. 208.

[4] *U. S.* v. *Piowaty & Sons*, 251 Fed. 375.
Asgill v. *U. S.*, 60 Fed. (2d) 780, 784-5.

conspiracy pleading, the agreement in fact claimed to have existed,—as distinguished from the circumstantial evidence from which the prosecution will ask the jury to infer the existence of such agreement—must be adequately averred.[5] Without such a statement of the hypothesis to which the evidence is to be directed, defendants are helpless in preparation for trial (even if acquainted with all the evidence on which the prosecution might rely) and the trial court is unable intelligently to rule on the materiality of proof.

In these indictments, as pointed out above, the only allegation pertaining to an agreement, understanding or consensual arrangement among all the appellees is the conclusory allegation, in the language of the statute, that they "entered into and engaged in a combination and conspiracy." As also pointed out, the combination and conspiracy is alleged to have existed for nine years and to have had some thirty separate "parts." How those "parts" became such or are otherwise connected with the alleged "conspiracy" is nowhere disclosed. Which, if any, of the parties agreed to any such "parts" is nowhere alleged. The relationship of the parts to each other is nowhere pointed out. In fact, it seems obvious that, lacking evidence of a written or oral agreement or understanding or plan among the defendants to perform the "acts" enumerated, and, therefore, being unwilling to accept the responsibility of alleging one, or unable to articulate a theory by which the pieces fitted together, or being unwilling to disclose it, the draftsman resorted to the ingenious device of listing the "separate acts" which he hoped to prove and of stating that they were "parts" of a "conspiracy", formation, existence and engagement in which is alleged only in the generic language of the statute.

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[5] *U. S.* v. *Piowaty & Sons*, 251 Fed. 375.
Pettibone v. *U. S.*, 148 U. S. 197.
Asgill v. *U. S.*, 60 Fed. (2d) 780, 784-5.

This, it was urged by appellees in the court below, would have been bad pleading in any Sherman Act conspiracy case. Where, as is true of the Sherman Act, the offense is described in the statute in general terms, it is not sufficient for an indictment to charge a violation in the generic language of the statute.[6] It must descend to particulars by apt averments of fact, describing the offense (here conspiracy) intended to be charged.[7] Without reasonably definite delineation of the basic issue in cases under that statute, frequently involving (as here) the operations of an entire industry over a period of years, undue prejudice to the defendants must result.

But, since the degree of particularity with which an offense must be pleaded varies with the nature and character thereof, the necessity for definite averment of the nature and manner of formation of the conspiratorial arrangement and of how the appellees became parties thereto and took action, assertedly joint, was commensurately increased in this case, in which charges of conspiracy to restrain trade and monopolize were made with respect to articles of commerce themselves the subject matter of the grant of a lawful, though limited, monopoly, to-wit, a patent monopoly. Such a grant permits the patentee to enter into certain agreements, and to impose certain terms and conditions on licensees in pursuance of that limited monopoly, and conversely, imposes certain restrictions upon the freedom of action of all others. This Court is familiar with the sharp and, in many instances, refined distinctions drawn in the patent-antitrust field with respect to the permissible scope of such agreements, terms and conditions, and the extent of such restrictions. In such a field, therefore, specificity in pleadings is most essential if they are to have meaning. Or, as stated by the court below (R. 42), approach to the challenge leveled by appellees had to be made "having in mind that the subject matter of

[6] *U. S.* v. *Cruikshank*, 92 U. S. 542, 557.
U. S. v. *Carll*, 105 U. S. 611, 612.
U. S. v. *Hess*, 124 U. S. 483.

[7] See cases cited in footnote 6.

the instant indictments is protected by a patent • • •,"— not for the purpose of determining the substantive sufficiency of the indictments, but in order to determine whether they advised the appellees of the real issues which they must be prepared to meet at trial.

For the reasons recited, we believe that it is abundantly clear that the charge thus leveled by the demurrers presented a substantial issue of pleading fundamental to the protection of the rights of the appellees. We think it is also apparent that the challenge went to the root of the indictments which, without an adequate pleading of the consensual arrangement allegedly complained of, were fatally defective.[8]

B. The Vagueness and Indefiniteness of the Allegations of the "Means" or "Parts" of the Alleged Conspiracy.

As previously stated, it was also the contention of the appellees below that, entirely aside from the insufficiency of the allegations describing the nature and character of the consensual arrangement complained of in the indictments, the indictments were also defective for failure to state with clarity the "means" intended to be employed in the effectuation of the alleged conspiracy. In other words, it was argued that the indictments were not only defective for failure to make clear how or in what manner the parties agreed, but also for failure to state clearly what they agreed to do.

Without attempting to catalogue all the major defects of the indictments in this connection, it is sufficient to note at this point that they abound with such vague and illusory phrases as "use the Jauch patent," "determine the use of patents," "devise a formula for determining minimum prices" and "induce acceptance of licenses," and refer vaguely to such activities as monopolizing unidentified but competing patents, securing "control of • • •

[8] *U. S.* v. *Piowaty, et al.*, 251 Fed. 375, 377.
U. S. v. *Falcone*, 311 U. S. 205, 210.

ownership and official personnel" of licensees, etc. Such looseness of expression occurs repeatedly in the description of the acts or courses of conduct upon which, as appears from the opinion below, the Government placed greatest stress.

It is, of course, clear, that, if appellees' contention as to the vagueness and indefiniteness of the material allegations of "means" was correct, the indictments were defective and subject to dismissal. The court below sustained that contention on reasonable grounds clearly explained in its opinion. Whether or not the views of this or any other court faced with that pleading problem would have exactly coincided with the views of the court below is, of course, not in issue here.

II.

The Sole Basis for the Judgment Below Was the Vagueness and Indefiniteness of the Indictments, and on Well Settled Principles, This Court Is, Therefore, Without Jurisdiction.

The decisions of this Court construing the Criminal Appeals Act establish that direct appeal to this Court does not lie from a judgment sustaining a demurrer to an indictment which rests on indefiniteness, vagueness or other deficiencies of an indictment as a pleading, as distinguished from a construction of the statute which underlies the indictment. (*U. S.* v. *Borden Co., et al.*, 308 U. S. 188, 193.) Nor does appeal lie in a case in which a district court has grounded its decision on a construction of the statute underlying the indictment, but has also rested its judgment upon the independent ground of a defect in pleading adequate to support the decision. (*U. S.* v. *Borden Co., supra; U. S.* v. *Hastings*, 296 U. S. 188, 193.)

It is the contention of these appellees that the judgment of the court below was based entirely on the sole issue presented to it, viz., the vagueness and indefiniteness of the

indictments. As we have previously noted, the court below understood that the points presented by the demurrers were matters of pleading only and so construed the demurrers (R. 33), with the hearty acquiescence of Government counsel. To assume that the district court decided other issues which were never submitted to it by the demurrers would do violence to the presumption that the judgment of a court does not extend beyond the issues presented for adjudication.

In this case, however, it is immaterial whether, by what we conceive to be an erroneous interpretation of the opinion below, it may be said that the district court also rested its decision upon a construction of the Sherman Act. This is so because the district court unquestionably decided the pleading issue alone presented by the demurrers, whatever else it may also have decided. And it cannot be gainsaid that the pleading ground was certainly the primary, and an independent, ground of decision, and one which went to the sufficiency of the entire indictment as a pleading.

A. The Court Below Clearly and Unequivocally Determined That the Indictments Failed Adequately to Describe the Consensual Relationship Necessarily Constituting the Gist of the Offenses Attempted to Be Alleged. In So Doing It Was Not Necessary for the Court to Pass Upon, and It Did Not Pass Upon, Any Controverted Question of Substantive Law.

As appears from an examination of the demurrers themselves (pp. 16-17, *supra*) and the preceding discussion, the primary basis of the challenge for vagueness and indefiniteness made by the demurrers was the utter failure of the allegations in the indictments to disclose to the appellees the nature, or manner of formation, or other requisite information concerning the supposed consensual arrangements upon which the charges of conspiracy were predicated.

The opinion of the court below was directly responsive

to that challenge. It unequivocally held that the indictments as a whole were fatally defective because of this manifest insufficiency.

The court had first occasion to consider this broad challenge in connection with the contention made by the Government below (and repeated in its brief in this Court—Br., p. 25) that the pleadings in these cases were like unto that in *Standard Sanitary Mfg. Co.* v. *U. S.*, 226 U. S. 20. Commenting upon this contention of the Government, the court stated (R. 37-38):

> "* * * there is no allegation that there was *any understanding or agreement among the defendants at all*, aside from the allegation that they 'knowingly have entered into and engaged in a combination and conspiracy to fix and maintain non-competitive prices and to monopolize the manufacture and sale of computer pumps and computing mechanisms, by the doing of the things set out.' The things and means then set out are things which I believe the *patentee* under its patent already had the right to do.
>
> "The Government argues that the instant case and the Bath Tub case have one basic common theme, that is, conspiracy, joint action, agreement to use the patent for the purpose of fixing prices among themselves. The difficulty is that the Government fails *to set out any identifying* facts to show that the Wayne Pump Company *and its licensees* did anything more than the law permitted them to do under the monopoly granted by the patent. *How they took joint action or entered into joint agreements* to use the Jauch patent to achieve the alleged illegal objectives, or *how* they went outside the monopoly granted to the patentee and its licensees, is nowhere set out in the indictments."

The above extract from the court's opinion demonstrates conclusively the following:

(1) It was the court's view that the indictments contained no allegations pertaining to agreement or understanding among the parties except the conclusory charge that they "engaged in a * * * conspiracy".

(2) It was the court's view, not disputed by the Government, that all the *acts* described in paragraph 27 of the indictment were acts which a patentee *individually* had the right to do.

(3) It was the court's view that the Government's argument that such acts, however lawful when done individually, could not be made the subject of agreement, was completely without application to the instant indictments, for the reason that there were no allegations whatsoever in such indictments adequately pleading either agreement or the manner of taking joint action.

(4) Whether or not the court was expressing an opinion on a substantive matter in stating that the acts charged in paragraph 27, if done by a patentee individually, were lawful, and if so, whether or not that view of the substantive law would have been correct or incorrect, is of no concern here. The court's conclusion that the indictments were devoid of definite allegations of agreement and of joint action was in no way dependent upon any opinion which it may have had at the time concerning substantive law.

(5) In short, it is apparent that the court's conclusion with respect to the lack of any sufficient averments as to agreement or other consensual arrangement would have been exactly the same whether it had found the means alleged in paragraph 27 to have been lawful or unlawful.

After reaching such conclusion that the indictments were devoid of adequate allegations of consensual arrangement, the court proceeded to consider *seriatim* the specificity of various of the allegations of "means" set forth in paragraph 27 of the indictments. This consideration was in response to the second, and independent, challenge of the demurrers to the definiteness of the indictments. *It is apparent, however, from an examination of the court's opinion with respect to each such means, that its entire*

discussion thereof is postulated on the assumption that there are no well pleaded charges in the indictments of an agreement or understanding to effectuate the conspiracies through such means.

This conclusion is buttressed by an argument made by the Government itself (Br., pp. 34-35). Thus, the Government complains that, in analyzing the allegations setting forth the so-called "resale price-fixing" means and holding them too vague and indefinite "reasonably to inform defendants" of the charge with respect thereto (R. 40-41), the court failed to consider that such alleged resale price fixing was "part of a horizontal agreement among" appellee manufacturers. The Government thus itself demonstrates the significant fact to which we have just called attention, viz., that the court's consideration of all the "means" allegations in the indictments was predicated upon its conclusion, theretofore reached and stated, that there were no adequate allegations of "horizontal agreement" among the appellees.

After completing its survey of such "means" allegations, and demonstrating in the course thereof on at least ten separate occasions that it was of the opinion that the second contention made by appellees was also well founded, viz., that the means themselves were obscurely alleged, the court summarizes its conclusions with respect to the indictments as a whole in the next to the last paragraph of its opinion (R. 42). In that summary, as in the preceding discussion, the court responds separately and distinctly to both points made by appellees' demurrers, and on each score condemns the indictments as a whole for failure to comply with the fundamental requirement that

> "• • • in every indictment the defendant is entitled to be informed with such definiteness and certainty of the accusations against him as will enable him to make his defense, and avail himself of acquittal or conviction in any further prosecution for the same offense." (R. 42.)

With respect to the sufficiency from a pleading standpoint of the allegations pertaining to consensual arrangement contained in the indictments, the court said (R. 42-43):

> "The charges are much too general. They do not adequately describe the nature of the alleged unlawful conspiracy[,] agreements or arrangements which defendants are accused of having made, nor show how the defendants became parties thereto, nor how they collaborated in doing the unlawful things * * *."

It would be difficult to frame a more pointed, plain and unambiguous ruling that the indictments were insufficient as pleadings because the heart of the offense attempted to be charged therein had not been clearly and definitely stated in accordance with constitutional requirements.

In the light of the foregoing review of the court's decision on the primary point made by appellees' demurrers, it is respectfully submitted that there can be no real dispute but that the court below, in disposing of that point, clearly based its decision upon a point of criminal pleading adequate to support its judgment. And, indeed, the Government in its brief makes no real effort to meet, as we believe, the insuperable obstacle to jurisdiction presented thereby. On the contrary, the Government substantially ignores the primary basis of attack made by these appellees on the indictments below and ruled upon by the court in its opinion.

In so far as we have been able to ascertain from examination of the Government's brief, the only real attack which it attempts to make upon our contention that the court ruled that the indictments were devoid of well pleaded allegations of consensual arrangement is the veiled attack implicit in the emphasis placed (Br., p. 27) on the following statement made in the penultimate paragraph in the court's opinion (R. 42):

> "*Having in mind that the subject matter of the instant indictments is protected by a patent*, I am of

> the opinion that the defendants here have not been furnished with such definite and particular allegations of fact as will meet this test (of certainty). * * *" (Italics added by the Government.)

By such emphasis, the Government does not dispute that the ruling of the court on the insufficiency of the allegations of agreement disposed of the indictments as a whole, but insinuates that the ruling was based upon a construction of the antitrust laws. This argument is completely refuted by the analysis of the court's opinion set forth above (pp. 26-29, *supra*), from which it appears that the court's ruling on that issue was in no way dependent upon any views which it may have entertained as to the substantive antitrust law. However, although the court's opinion does not show any such *dependency*, we do not mean to indicate that the court, in exercising its informed judgment as to the lucidity of the allegations pertaining to the nature, character and manner of formation of the consensual arrangement complained of, may not have had regard to the substantive law background which so amply discloses the necessity for frank, clear and sharp allegations in a patent antitrust case. The point is, however, that such consideration, if indulged in, was in no sense a determination of any controverted question of substantive law or in any way incident to a ruling on the sufficiency of the allegations in question to charge an offense under the Sherman Act. That is plainly determinative here, and the Government's veiled suggestion (Br., pp. 21-22) that a *nisi prius* judge, in appraising the definiteness of a pleading, must divorce himself of all knowledge of the substantive law background, or else be held to have based his decision on the substantive law, is entirely lacking in realism and merit. Indeed, the logical implication of that suggestion is that this Court must take jurisdiction of all Criminal Appeals.

B. The Court Also Determined That All Material Allegations of "Means" Contained in the Indictments Were Vague and Indefinite, and, in So Doing, Did Not Determine, or Rest His Decision Upon, Any Controverted Question of Substantive Law.

As previously noted, the appellees also urged by their demurrers a second contention (in no way dependent upon the first, just discussed), to-wit: that the indictments failed adequately to describe the "means" for effectuation of the alleged conspiracy. Having sustained the first point of the challenge for vagueness and indefiniteness, it would, of course, have been unnecessary for the Court to have dealt with the second ground at all. However, in the interest of completeness, the court likewise dealt with and sustained the challenge leveled by the second ground.

It is obvious, and is indeed suggested by the Government in its brief, that not all the "separate acts or means" alleged in the indictments are of material consequence, some dealing "with minor details" (Br., p. 11). The Government in its brief, has selected certain "means" as affording material support for *its* contention that violation of the Sherman Act was disclosed by the indictments (assuming adequate averment of the fact and manner of agreement). Those means may be classified as those relating to the Government's contentions that

1. "The indictment charges an unlawful conspiracy to use the Jauch patent to fix manufacturers' prices by joint action for the benefit of the patentee's former competitors" (Br., pp. 48-9);
2. "The indictment charges an unlawful conspiracy to fix resale prices" (Br., p. 50); and
3. "The indictment charges an unlawful conspiracy to pool, and suppress competition under, competing patents for the purpose of eliminating price competition" (Br., p. 46).

The same means are relied on by the Government in connection with its contention (made on the same assumption) that the indictments as a whole charged a violation of the Sherman Act (R. 38-40).

Accordingly, we consider the disposition which the trial court made of the allegations of such "means", grouped in accordance with the classification which the Government has itself made. The court squarely held, in each instance, that such means were defectively pleaded because of their vagueness and indefiniteness.

The "means" of the first class, viz.: those relating to alleged "use of the Jauch patent to fix manufacturers' prices by joint action", are the first considered by the court in its opinion (R. 37). The court disposes of such means by pointing out that

> "What is meant by the phrase 'used the Jauch patent' is not quite clear. If the defendants did more than enter into ordinary patent license agreements, under the terms of which the Wayne Pump Company, as owner of the patent, licensed the others to manufacture computer pumps, and fixed the prices at which the pumps should be sold * * *, then such offense should be set out clearly in the indictments" (R. 37).

The court thus obviously held the averments insufficient solely because defectively pleaded.

The Government's contrary argument (Br., p. 32) is based on the suggestion that the court was deciding a litigated issue of substantive law in pointing out (immediately prior to the ruling above set forth) that the only pumps to which the price-fixing charge related were computer pumps—pumps the price of which Wayne had the right to fix under the Jauch patent (R. 37). But that suggestion is utterly untenable. The first portion of that statement of the court was manifestly a construction of the pleadings; the second, a parenthetical reference to an *undisputed* legal proposition made only for the purpose

of aiding the court in a *further construction* of the pleadings.

As noted in the Statement herein (p. 6, *supra*), the court construed the indictments as disclosing that the Jauch patent dominated the computer pump field. Wayne owned that patent. It thus plainly followed, under the decisions of this Court in *United States* v. *General Electric Co.*, 272 U. S. 476, and *Bement & Sons* v. *National Harrow Co.*, 186 U. S. 70, that Wayne could grant licenses to other manufacturers upon the condition that the article manufactured be not sold at a price lower than that fixed by Wayne. The court accordingly concluded that it was not the grant of such licenses (also disclosed by the pleading) of which the indictments intended to complain in referring to "use" of the Jauch patent to fix prices,—and *this was not disputed by the Government.* Of what, then, did the indictments intend to complain by such language? The court ruled that that was not clear.

We repeat,—so that there may be no possible misapprehension,—that the proposition that a patent owner is legally entitled thus to fix the prices of his licensees was in no sense a controverted issue of substantive law in the court below. There, as here, the Government took the position that

> "This • • • is not a case where the patentee by independent action has fixed the selling prices of his licensees for the purpose of protecting his monopoly and the pecuniary reward therefrom" (Br., p. 49),

as was true in *United States* v. *General Electric Co.*, *supra*,[1] but is a case in which

> "The indictment charges *mutual agreement* among all the dominating manufacturers for the purpose and with the effect of fixing prices and eliminating competition • • •" (Br., p. 45).

[1] The Government has never, either here or in the court below, challenged the correctness of the *Bement* and *General Electric* cases, but, rather, is at pains to distinguish them (Br., pp. 44-45).

This latter suggestion, raising purely a pleading issue, was, however, rejected by the court, as heretofore noted at greater length (*supra*, pp. 26-27):

> "*How* they took *joint action* or entered into *joint agreements* to use the Jauch patent to achieve the alleged illegal objectives, or *how* they went outside the monopoly granted to the patentee and its licensees, is nowhere set out in the indictments." (R. 38.)

With respect to the "means" of the second class, viz.: those relating to alleged fixing of resale prices, the court's ruling is equally clear. Indeed, it is not contended by the Government herein that the court, in stating abstractly the substantive law background, in any way misstated the law or passed upon a controverted question of substantive law. With obvious correctness, the court pointed out that it was unlawful to attempt to regulate future prices of a patented article after sale by the owner, citing the well-known decisions of this Court (R. 40). The court did, however, find serious fault with the manner in which the so-called resale price-fixing means were pleaded, saying (R. 40):

> "However, *no facts* are set out to show that Wayne computer pumps were sold through jobbers, nor are the names of any specific jobbers given with whom these defendants carried on negotiations wherein the resale price of computer pumps was determined."

On this question of pleading, the court cited *United States* v. *Colgate & Co.*, 263 Fed. 522, affirmed 250 U. S. 300, which held that similar charges were not "stated and set forth with that degree of accuracy and certainty required in criminal pleading." The reliance by the district court on this decision is most persuasive that the questions with which the court was dealing and which it decided were purely pleading questions. This fact is further emphasized by the succeeding paragraph of the court's opinion, in which the court says:

> "So in the case at bar, if these conditions exist, the

> Government should have no difficulty in setting forth at least one specific instance of where defendants determined the resale price at which jobbers might resell computer pumps. If this condition does exist, surely the Government must be in possession of the facts, and *they should be set out in the indictments, so as to reasonably inform defendants of the offense with which they are charged*" (R. 41).

In the light of the foregoing, the Government is reduced to the contention (Br., pp. 34-35) that the trial court necessarily based its decision in respect of the resale price-fixing allegations of the indictment on a construction of the Sherman Act because of its "failure • • • to consider whether the Sherman Act condemns" a horizontal "agreement to fix resale prices and to boycott non-complying jobbers." This is mere grasping at straws. The court, as a matter of pleading, had already ruled that there were no sufficient allegations of *any* horizontal agreement in the indictments (*supra*, pp. 26-29).

With respect to the "means" of the third class, viz.: those relating to alleged pooling and suppression of competition under competing patents, the ruling of the court that the indictments were defective as pleadings is equally unequivocal.

Here again the trial court does not consider or discuss the substantive question of whether or not, if competing patents were involved, the indictments would charge offenses under the Sherman Act, but discusses what *facts* are disclosed by the indictments as to the asserted existence and aggregation of such patents or the suppression of competition thereunder. The court points out that although the "Government • • • insists that not one but many patents on computer pumps, computing mechanisms and improvements thereon were used to achieve the illegal purpose or conspiracy",

> "again the indictments *are silent* as to the identity of the other patents aside from the Janch patent issued in November, 1932" (R. 41).

It rests its decision with respect to alleged aggregation of competing patents on the ground that

> "the indictments *set out no facts* whereby to *identify* these competing patents, *nor in what manner nor by whom* such monopoly in them was acquired" (R. 41).

And, in respect of the Government's claim of suppression, founded on the allegations of "determination of use" by Wayne, the court adds:

> "Again *it is not clear* what is meant by the allegation that defendants attempted to compel Neptune to submit all patents * * * 'to uses determined by Wayne' " (R. 38).

From the foregoing resume of the court's rulings with respect to each of the three classes of "means" assigned as material by the Government itself, it conclusively appears that the court held such allegations defective solely as a matter of pleading and that its decision thereon was in no way dependent upon any controverted question of substantive law. That being so, it is likewise apparent that the court's decision on the second leg of appellees' demurrers disposed of the indictments in their entirety as defective pleadings and not for substantive insufficiency.

It is true, of course, that the court in the course of its opinion referred to various decisions applying the Sherman Act to patent anti-trust situations. For reasons stated at an earlier point, it was obviously proper for the court to have had reference to the substantive law background in construing and passing upon the vagueness and indefiniteness of the pleadings. It is to be emphasized, however, that in no sense was it determining any controverted questions of substantive law. None such was presented for decision. And, indeed, with the following exceptions, based upon a misapprehension of what the court stated, the Government does not now dispute that every abstract statement made by the court in referring to the substantive law background was correct as a matter of law.

At p. 25 of its brief, the Government states:

> "Preparatory to discussing the allegations of the

indictments the court stated its view of the scope of the patent monopoly to be that a patentee has power to fix prices and grant licenses upon any terms he may choose" (R. 34-36).

This was not what the court said. The statement made by the Government omits the significant proviso contained in the opinion:

"provided only that in so doing it did not violate any other law" (R. 34).

With the foregoing proviso the statement made by the court is obviously correct and paraphrases the very contention made by the Government in this Court.

The foregoing proviso likewise appears at the end of the quotation by the court from the opinion in the case of *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Works Co.*, 154 Fed. 356 (R. 34) and indicates one of the purposes of its citation of that case. That case was plainly not cited, as the Government misapprehends (Br., p. 25) "to show that whatever the patentee could do alone, he could do with others in combination," but only in support of the general proposition, containing the proviso, which we have set forth above, and of the likewise undisputed proposition that a "patentee * * * had the right to fix prices on the patented article" (R. 34, 36).

The court in its opinion made the following abstract and indisputably correct statements concerning the patent anti-trust law background (R. 37):

"While ownership of the patent gives to the patentee a complete monopoly within the field of his patent, it of course does not give him any license to violate the provisions of the Sherman Act or of any other law. Under his monopoly he may not use his patent as a pretext for fixing prices on an unpatented article of commerce; nor fix the resale price on his patented article; nor make use of tying clauses."

Counsel for the Government in their brief in this court, in commenting on this language of the district court, make the wholly unwarranted statement (Gov. Brief, p. 26) that

the court "held that *the only limitation* upon the power of a patentee, acting alone or in combination with others is that 'he may not use his patent as a pretext for fixing prices on an unpatented article of commerce; nor fix the resale price on his patented article; nor make use of tying clauses.'" The court obviously neither held nor indicated anything of the kind and had no occasion so to do. It was merely illustrating the point that the ownership of a patent gives the patentee no license to violate the Sherman Act or any other law.

The Government makes one further argument in an attempt to show that the decision of the court on this branch of appellees' demurrers was based upon a construction of the Sherman Act and constituted, in effect, a ruling that the indictments did not state offenses within the meaning thereof. It refers (Br., p. 26) to the statements made by the court towards the close of its opinion (after it had considered and found defectively pleaded every major "means" alleged in the indictments) to the effect that it did not find that the defendants were "charged with the doing of anything which they did not already have the right, under the patent, to do" (R. 42).

But, in the light of the court's previous painstaking review of the allegations of the major "means", in which it on at least ten separate occasions clearly pointed out that such means were defectively pleaded because vague and indefinite and lacking in identifying facts, it cannot reasonably be contended that the court at that point reversed its position and suddenly determined that all the means allegations in the indictments were defective from a substantive standpoint,—an issue not before it. On the contrary, the plain intent of the court was to convey that the defendants were not *properly* charged with doing any unlawful act.[2] The court had already disposed of the

[2] The same thought is conveyed by the last clause in the penultimate paragraph in the court's opinion (R. 43), where the sense is plainly that the indictments do not *adequately* "set out any unlawful means whereby the unlawful objectives were accomplished."

pleading insufficiency of the major "means" alleged. The Government did not then suggest, and does not now suggest, that, after excision of such means from the indictments because defectively pleaded, the remaining allegations of means in and of themselves state unlawful conduct. And the language which follows the statement above quoted from the opinion of the court shows clearly that the court was referring only to the granting of price restrictive licenses by the owner of a patent to manufacturing licenses —a right of the patentee which has never been challenged by the Government in this case.

On the basis of the foregoing discussion, it is, therefore, respectfully submitted that, in sustaining the second point raised by appellees' demurrers, the court passed upon a second question of criminal pleading, fully adequate to support its judgment, and in no wise dependent upon the decision of any controverted question of substantive law.

III.

The Vagueness and Indefiniteness of the Indictments Was, At the Very Least, An Independent Ground of Decision, Fully Adequate to Support the Judgment Below, Wherefore This Court Is Without Jurisdiction.

It is our view that the district court sustained appellees' demurrers *solely* on the basis of the two points presented thereby, viz., (1) that the indictments failed adequately to plead and describe either the existence, or the nature, or the manner of formation of the consensual arrangements respectively constituting the gist of the charges made therein, and (2) that the indictments failed adequately to plead and describe the means for effectuation of such consensual arrangements. It is also our view that the court's determination of those questions,—decision of either of which was adequate to dispose of the case,—was not dependent upon a construction of the Sherman Act.

The Government does not seriously dispute, nor could it properly dispute, that the court decided that the indictments failed adequately to disclose the consensual arrangements complained of, independent of any construction of the Sherman Act.

Rather, the Government contends in effect (Br., p. 23) that, in disposing of the allegations of "means", the court below held that such means as were clearly alleged were insufficient on substantive grounds and that, to the extent that the indictments intended to charge the employment of other means, they were vague and indefinite. This is a question-begging argument, since it ignores entirely the problems of which means were material and whether the court passed on any controverted questions of substantive law. (See pp. 31, 38-39, *supra*.)

But, even if it be assumed for the sake of argument that the court below decided some controverted questions of substantive law in disposing of the means allegations (which we deny), that would nevertheless fail to establish that this Court has jurisdiction over these appeals. For even on such an assumption, it remains clear that the court below, in determining that the indictments failed adequately to describe the consensual arrangements complained of, rested its decision upon an independent pleading ground, wholly adequate to dispose of the case. Under such circumstances, it is definitely established by the decisions of this Court that appeal does not lie (*supra*, p. 24).

IV.

The Burden Resting Upon the Government of Showing Affirmatively That Construction of the Sherman Act Was the Sole Ground of Decision Below Has Not Been, and Cannot Be, Sustained.

This Court has said that the right of direct appeal given to the Government by the Criminal Appeals Act is "exceptional" and to be "strictly limited to the instances

specified." It is "an innovation in criminal jurisdiction in certain classes of prosecutions" which "cannot be extended beyond its terms." (*U. S.* v. *Borden Co. et al.*, 308 U. S. 188, 192, *U. S.* v. *Keitel*, 211 U. S. 370, 399, *U. S.* v. *Dickinson*, 213 U. S. 92, 103.) The burden of proof is on the Government affirmatively to establish this Court's jurisdiction, and all doubts and ambiguities are to be resolved against appellate jurisdiction under the Act. (*U. S.* v. *Carter*, 231 U. S. 492, 493, 494, *U. S.* v. *Moist*, 231 U. S. 701, 703; *U. S.* v. *Halsey, Stuart & Co.*, 296 U. S. 451, 452.)

Applying these principles, this Court has ruled that where, as here, jurisdiction is invoked on the ground that the decision below was "based" upon a construction of the statute upon which the indictment was founded, the Government must *affirmatively* establish *that* proposition. (Cases cited, *supra*.) The necessary corollary of that rule is that in such cases the Government must affirmatively establish that the decision below was rested on the ground of statutory construction *and on that ground alone*.[1] And, indeed, the Government herein does not undertake any less burden.

For the reasons heretofore stated, we respectfully submit that the Government has not sustained that burden. It is submitted that, on the contrary, it affirmatively appears that the decision below was based on the sole ground raised by the demurrers, to-wit, the vagueness and indefiniteness of the indictments.

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[1] By the enactment of the Act of May 9, 1942 (56 Stat. 401), amending the Criminal Appeals Act as theretofore amended, the Government was granted the right to appeal to the Circuit Courts of Appeal from judgments sustaining demurrers to indictments, not directly appealable to this Court. That amendment (although it has no application to these appeals) emphasizes the lack of any occasion for this Court's departing from the principles of its prior decisions establishing the limited scope of its jurisdiction over direct appeals.

Conclusion.

It is respectfully submitted that these appeals should be dismissed.

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